

9-1-2006

In re Town of Nottingham, 904 A.2d 582 (N.H. 2006)

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Brandon Saxon, Court Report, In re Town of Nottingham, 904 A.2d 582 (N.H. 2006), 10 U. Denv. Water L. Rev. 195 (2006).

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leged specific damages including harm to crops, insufficient water for livestock, and diminished beauty and value of its property, Central made no specific damage claims. While Spear T sought injunctive relief to prevent future harm by the removal of water that would specifically be available to it but for the defendants' actions, Central sought injunctive relief to prevent defendants' use of water that would be "otherwise available" to it primarily for storage. Spear T limited its complaint to that amount of water which defendants "unreasonably" removed, while Central sought to enjoin all upstream uses by the defendants. Finally, Spear T's complaint sought relief from particular defendants, while Central generally opposed ground water appropriators. The underlying law required that the court balance the specific competing interests of the surface users and the ground water appropriators. Because Central's claimed interests did not align with those claimed by Spear T, the court did not find an adequate link between Central's claims and the subject matter of the action such that a judgment rendered for either party would directly affect Central.

The court affirmed the district court's denial of Central's motion to intervene, noting that Central was free to bring an action against the defendants based on its own interests in preventing ground water appropriation.

Kathleen Ott

NEW HAMPSHIRE

In re Town of Nottingham, 904 A.2d 582 (N.H. 2006) (affirming the Department of Environmental Services issuance of an extensive groundwater withdrawal permit to USA Springs, Inc., for a proposed water bottling plant based on the Department's reasonable interpretation of the statutory language contained in the Groundwater Protection Act).

In May of 2001, USA Springs, Inc. ("Springs") applied to the New Hampshire Department of Environmental Services ("DES") seeking a groundwater withdrawal permit to withdraw over 400,000 gallons of water per day from a single spring and three bedrock wells. Subsequent to hydrogeologic testing, DES denied the application in August of 2003. DES denied the application due to failure to meet regulatory requirements regarding withdrawal quantities and quality. DES granted a rehearing, but DES again denied the application. Four months later, Defendant submitted a second application for the same withdrawal permit and in March of 2004, DES approved the application and issued the groundwater withdrawal permit.

Two New Hampshire Towns, Nottingham and Barrington, along with the environmental group, Save Our Groundwater (collectively "SOG"), challenged DES's issuance of the permit to USA Springs un-

der New Hampshire's Groundwater Protection Act ("GPA") and filed suit in New Hampshire Supreme Court.

SOG contended that DES erred in finding no requirement to consider the public trust to manage the groundwater to the maximum public benefit as required by the GPA. SOG first contended that DES erred in not requiring Springs to apply for a dredge and fill permit as required by the GPA and that the DES should have held a "prime wetlands hearing" also pursuant to the GPA. Secondly, SOG contended that DES's granting of the application was an unconstitutional taking and that DES failed to hold the required adjudicative hearing. Plaintiffs also contend that the DES should have granted Plaintiffs an appellate review before DES as required under the GPA. Third, SOG argued that the DES erred in accepting Springs' hydrologic model as it was rife with error, including unexplained gaps, contradictions of data, poor testing conditions, and stabilization of wells during testing. Finally, SOG argued that DES violated its own rules by accepting a re-submission of the same application, a decision contrary to the GPA.

In evaluating DES' issuance of the permit, and the Plaintiff's allegations, the court relied on the statutory language of the GPA. Looking to the words of the GPA statute, the Court rationalized all of DES's decisions.

The court found that the GPA directs DES to adopt rules including criteria and procedures for requiring applicants to identify and address impacts of withdrawals on surface water, subsurface water, water-related natural resources, and public, private, residential, and farm wells within the anticipated "zone of contribution" to the withdrawal.

The court first held that the GPA provided the criteria that DES had to follow in issuing permits and that the Act imposed no specific additional test that DES was required to apply. Next, the proposed groundwater withdrawal was not subject to the permitting requirements of the GPA referring to fill and dredge in wetlands; thus, DES was not required to hold a public hearing. The court went on to find that granting the permit was not a taking because the right of user of groundwater was not a protected property interest. The fact that the town was entitled to notice and to submit comments under the GPA did not make it a party entitled to an adjudicative hearing in a contested case. Although the GPA failed to define "need," the court looked to the dictionary, and found the definition of "need" was "requisite, desirable, or useful." From that definition, the court found that DES could have reasonably concluded that the description of need complied with the GPA and that DES had not failed to follow its own rules.

The court affirmed the decision of the DES to grant a large withdrawal permit to USA Springs, Inc.

Brandon Saxon